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Supreme Court, U.S.
FILED
07-224 AUG 15 2007
OFFICE OF THE CLERK

No. 07-___

IN THE

Supreme Court of the United States

STEPHEN REEDER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether written statements contained within files that are "business records" for purposes of Fed. R. Evid. 803(6), but which are made by non-testifying third parties not affiliated with that corporation, are admissible notwithstanding that they constitute "hearsay within hearsay" under established precedent of several Courts of Appeals and fail to satisfy Fed. R. Evid. 805.

(2) Whether a real estate agent, possessing no foundational expertise in real property valuation, may, consistent with Fed. R. Evid. 701, provide lay opinion testimony on the market value of real property.

STATEMENT OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The caption identifies all parties to the proceedings below.

Because Petitioner is an individual, no disclosures are required by Supreme Court Rule 29.6.

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OPINION BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit, *United States v. Stephen Reeder*, No. 05-50866, 2007 WL 1454965 (9th Cir. May 17, 2007), is set forth in the Appendix. (App. A.)

The judgment of the district court, *United States v. Stephen Reeder*, No. SA CR01-135-AHS (C.D. Cal. Nov. 14, 2005), is also set forth in the Appendix. (App. B.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment sought to be reviewed was entered May 17, 2007. An order granting Petitioner's motion to extend time to file a petition for rehearing or rehearing en banc was entered on June 6, 2007. No such petition for rehearing was subsequently filed.

STATUTORY PROVISIONS INVOLVED

This Petition presents issues for review under Fed. R. Evid. 403, 701, 702, 801, 803 and 805.

Rule 805 states: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Rule 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (a) rationally based on the perception of the witness,

(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The full texts of Rules 403, 702, 801 and 803 are set forth in the Appendix. (App. C.) This Petition also relates to charges of bank fraud under 18 U.S.C. § 1344, which is also set forth in the Appendix. (*Id.*)

STATEMENT OF THE CASE

This Petition asks the Court to resolve a conflict among the Courts of Appeals concerning whether hearsay embedded within business records remains inadmissible as "hearsay within hearsay."

A. The Charges

On August 15, 2001, a grand jury returned an indictment against Petitioner Stephen Reeder, charging him (along with two co-defendants) with three counts of bank fraud under 18 U.S.C. § 1344 for engaging in an alleged "scheme" in which bank loans on three properties in or around Palm Springs, California, were obtained using allegedly "inflated" property appraisals.

For each count, the government sought to portray the following similar set of events. First, the borrower would submit a loan application seeking to borrow funds to buy or refinance property at a stated value. The borrower's application would include an appraisal opining that the property was worth that stated value. After receiving the funds, the borrower would default. After foreclosure proceedings began, the bank would obtain a third-party appraisal opining that the property was worth far less than the appraisal initially submitted by the borrower in its

original loan application.

Specifically, on each count, the indictment alleged:

483 Via Esquela, Palm Springs, CA (Count 1): In December 1994, Bank United of Texas loaned $487,500 to a Ms. Diane Fullerton to purchase 483 Via Esquela for a purported price of $650,000. An appraisal submitted by Ms. Fullerton as part of her loan application valued 483 Via Esquela at $650,000. During subsequent foreclosure, the bank obtained a written appraisal dated November 27, 1996 from a third party, Mr. Robert Kreick, who valued the property at $230,000. Mr. Kreick, however, did not testify at or before trial.

325 West Vista Chino, Palm Springs, CA (Count 2): In December 1995, Sunbelt Mortgage loaned $528,000 to a Mr. Alan Staggs to purchase 325 West Vista Chino from his colleague, Ms. Fullerton. An appraisal submitted by Mr. Staggs as part of his loan application valued 325 West Vista Chino at $661,000. He later defaulted on this loan. During foreclosure, the bank obtained a written appraisal dated November 6, 1996 from a third party, Mr. Daniel Hamilton, who valued the property at $210,000. Mr. Hamilton, however, did not testify at or before trial.

45350 Via Corona, Palm Springs, CA (Count 3): In early 1996, Temple-Inland loaned $479,200 to a Mr. Raymond Hastey to refinance a loan used to purchase 45350 Via Corona. An appraisal submitted by Mr. Hastey as part of his refinancing application valued 45350 Via Corona at $600,000. During foreclosure, the bank obtained an appraisal dated January 15, 1997 from a third party, Mr. Richard Hill, who valued the property at $250,000. Mr. Hill, however, did not testify at or before trial.

B. The Trial in the District Court

Between January 4 and 20, 2005, Mr. Reeder was tried before a jury in the United States District Court for the

Central District of California. Over the course of the trial, the issue of property valuation became crucial.

During the trial, the government introduced evidence that Mr. Reeder had negotiated the initial purchase of the three properties for prices materially below the purported prices that had been disclosed in the bank applications – and also below the amounts in the appraisals submitted with those loan applications. Mr. Reeder's counsel, however, argued that Mr. Reeder had merely identified properties that were selling below market price, and presented evidence that the appraisals submitted as part of the loan applications were not inflated. Specifically, Mr. Reeder's defense counsel called one of the appraisers, Mr. Stephen Barr (author of the appraisal on 483 Via Esquela), who testified that that appraisal was fair.

The government did not call any property appraisal expert to rebut this testimony or to establish, objectively, the actual value of the three properties. Instead, it relied heavily on the testimony of two alleged co-wrongdoers, Ms. Rebecca Holmes-Schwinck (as to Counts 1 and 2) and Mr. Raymond Hastey (co-defendant in Count 3), as purported proof that Mr. Reeder played a role in making certain misstatements to the banks in the course of the three loan applications. Both these witnesses, however, were themselves tainted by their own admitted complicity in the fraudulent scheme, because both conceded that they had authored misstatements to the banks.

Realizing that the self-evidently suspect testimony of two wrongdoers alone was unlikely to be persuasive, and that Mr. Barr's sworn valuation testimony might be accepted unless contradicted by some other source, the government looked for ways to prove, objectively, that the appraisals accompanying the borrowers' three loan applications were "inflated," i.e., above market value.

The Third Party Appraisals. First, the government submitted, as "proof" of the properties' "true" market worth,

the three third-party appraisals authored by Messrs. Kreick, Hamilton and Hill and forwarded to the banks during the foreclosure of the three properties. The bank files had been stipulated to be authentic business records of the banks, but none of Messrs. Kreick, Hamilton or Hill worked for those banks, and so they were third-party declarants vis-à-vis those banks.

In these appraisals, Messrs. Kreick, Hamilton or Hill valued the properties at levels much lower than those disclosed in the appraisals that had been submitted earlier, as part of the loan applications. Although defense counsel objected to these third-party appraisals on the grounds that none of their authors, Messrs. Kreick, Hamilton or Hill, had testified at or before trial, or been made available for cross-examination on the methodology of or assumptions underlying the reports, the district court admitted all three reports.

During closing statements, the government referenced the foreclosure appraisals several times, making them among the freshest pieces of evidence in the jury's mind during its deliberation. The government specifically argued that the disparity between the foreclosure appraisals and the original appraisals proved that the original appraisals were "out in the stratosphere" and therefore bogus.

Lay Opinion Testimony on Property Value. In a purported effort to confirm the foreclosure appraisals' illusory indication of true market value, the government introduced the testimony of Ms. Cena Rasmussen, a real estate agent for Century 21, who testified to the jury on her opinion of the "worth" of 325 West Vista Chino. The district court, over defense counsel's objection that this lay opinion testimony lacked "foundation," allowed this testimony, notwithstanding that Ms. Rasmussen was not a qualified appraiser and had not addressed, much less purported to apply, standard appraisal principles. During its closing, the

government characterized Ms. Rasmussen's opinion as that of a "professional."

C. Verdict and Sentence

On January 18, 2005, the jury returned a guilty verdict against Mr. Reeder on all three counts. On November 11, 2005, Mr. Reeder was sentenced to 46 months' imprisonment, five months' supervised release, and imposed a special assessment of $150.

D. Proceedings before the Ninth Circuit Court of Appeals

On appeal, Mr. Reeder objected to the trial court's rulings admitting the foreclosure appraisals and Ms. Rasmussen's valuation testimony. In demonstrating that both these issues were properly preserved for appellate review, Mr. Reeder noted that defense counsel timely objected at trial to (1) not being afforded "the right to cross-examine or to confront" the foreclosure appraisals' authors, and (2) the lack of a proper "foundation" for Ms. Rasmussen's lay opinion testimony. These objections specifically refuted the government's argument that Mr. Reeder waived his right to appeal these issues.

Nevertheless, the court below affirmed the judgment and sentence. In doing so, it held that: (1) as to the foreclosure appraisals issue, Mr. Reeder had "waived his business record foundation claims when he expressly and voluntarily stipulated to the records' foundation" (App. A at 2); and (2) the district court "did not plainly err" in admitting Ms. Rasmussen's lay opinion testimony. (*Id.*)

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision, in affirming the rulings to admit these two key pieces of property valuation evidence in the government's case, conflicts with the decisions of other Circuits (and several lower federal courts) and undermines

important truth-finding values and purposes served by the relevant Federal Rules of Evidence.

First, the court's affirmance of the district court's admission of third-party foreclosure appraisals conflicts with the precedent of other Circuits holding that hearsay embedded within business records remains inadmissible as "hearsay within hearsay." The three foreclosure appraisals contained in the banks' loan files were authored by employees of three separate, independent firms – *not* by the banks themselves. Thus, although Mr. Reeder stipulated that the *bank files* were "business records," this did not prejudice his right to object to them on other grounds, including on the ground that the statements in those files by the third-party appraisers, who had not been available for cross-examination, were inadmissible hearsay. Such an objection is supported by Fed. R. Evid. 801, as well as by settled Circuit court precedent holding that hearsay, even if embedded within business records, remains inadmissible as "hearsay within hearsay," and does not fall within any exception to hearsay, as Fed. R. Evid. 805 would require for it to be admissible.

As Fed. R. Evid. 805 recognizes, and as the First Circuit has held, hearsay embedded within business records is *still* inadmissible hearsay when the third-party statement itself was not generated by the record's custodian (or does not fall under any other hearsay exception). *See United States v. Patrick*, 248 F.3d 11, 21 (1st Cir. 2001); *see also Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir. 2003); *United States v. Cruz*, 894 F.2d 41, 44 (2d Cir. 1990); *Fla. Canal Indus., Inc. v. Rambo*, 537 F.2d 200, 201-03 (5th Cir. 1976). Here, the foreclosure appraisals were not generated by the banks or their employees. The Ninth Circuit's decision is in conflict with established precedent from other Circuits, warranting certiorari review on this important evidentiary issue.

Second, in holding that a mere real estate agent, Ms.

Rasmussen, could properly give valuation testimony without the proper foundation, the opinion below conflicts with Fifth Circuit precedent holding that such lay opinion testimony requires expertise in formal appraisal principles. *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998). The Ninth Circuit, by holding to the contrary, joins a handful of lower federal courts and federal bankruptcy courts on this issue, making it ripe for this Court's review.

Although the court below held that defense counsel's objection to the "foundation" of Ms. Rasmussen's lay opinion testimony was insufficient to preserve the issue for review (App. A at 2), this holding necessarily (but incorrectly) assumes that the absence of a "foundation[al]" basis for giving an opinion on real property value is not a proper objection. This assumption, however, is contradicted by *Hidden Oaks* and its progeny. Thus, were the Fifth Circuit's rule applied, the objection would have been sufficient (and indeed should have been sustained).

Resolution of these issues is important to protect the established policies and principles underlying the Federal Rules of Evidence. Guarantees of trustworthiness and reliability are the foundation for the Rules governing exceptions to the hearsay rule. Similarly, Rule 701, which governs lay opinion testimony, is designed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *Cuyahoga Metropolitan Housing Authority v. United States*, 60 Fed. Cl. 481, 483 (2004). The precedent set by the decision below threatens these established policies and protections.

This Petition, therefore, should be granted to bring Ninth Circuit precedent in line with the majority position on both of these issues, as well as to ensure its adherence to the policies and protections of the Federal Rules of Evidence.

I. The Decision To Admit Third Party Property Appraisals, Contained Within Bank Files, Conflicts With Other Circuit Decisions Holding That Such Evidence Is Inadmissible "Hearsay Within Hearsay"

A. Third-Party Valuations In A Bank's Files, Expressing Opinions Of Non-Testifying Experts, Are Classic "Hearsay Within Hearsay"

In upholding the trial court's admission of the third-party appraisals, the Ninth Circuit considered it sufficient that the bank files themselves were "business records" (App. A at 2) and thus necessarily presupposed that third-party statements contained in corporate files qualifying as "business records" may never constitute hearsay. This conflicts with the precedent of other Circuits holding that hearsay embedded within business records remains inadmissible as "hearsay within hearsay."[1]

In *United States v. Patrick*, 248 F.3d 11, 21 (1st Cir. 2001), the defendant sought to introduce handwritten notes found in police files which the defendant argued proved, among other things, his innocence. The notes were, specifically, "police notes that person X (often not identified at all) told the police that person Y (often identified only by a single name) had committed the [ ] murder." *Id.* at 21. The First Circuit held that "[i]n order to offer the police notes for the truth of their contents: (a) the notes must be admissible themselves under some exception to the hearsay rule or be sufficiently trustworthy as to fall within the residual

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[1] *See* 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 805.03 (2d ed. 2007) (where "a party seeks to introduce a business record and the person who made the record has no personal knowledge of the underlying event and has based the entry on information supplied by another," such a statement is "multiple hearsay").

exception of *Fed. R. Evid. 807*; (b) the hearsay within the notes must be admissible; and (c) the evidence must not be so prejudicial as to violate *Fed. R. Evid. 403*." *Id.* Therefore, even if the handwritten notes might have been admissible under the "business records" exception set forth in Fed. R. Evid. 803(6), "where those notes contain information from informants who are not themselves part of the business of police, that information is not admissible as an exception to the hearsay rule." *Id.* at 22.

As the First Circuit noted, "[t]his gloss on the business records exception, which the Federal Rules elsewhere call the 'hearsay within hearsay' problem, *Fed. R. Evid. 805*, is well-settled in [the First Circuit]. *Other circuits are in accord.*" *United States v. Vigneau*, 187 F.3d 70, 76 (1st Cir. 1999) (emphasis added). Indeed, the Second, Fourth and Fifth Circuits have all held that, unless the third-party statement itself falls under some exception to the hearsay rule, hearsay embedded in business records is inadmissible "hearsay within hearsay." *See Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir. 2003) ("[E]ven if the letter [that was hearsay] could be considered part of a larger business record . . . , this would present a double hearsay problem."); *United States v. Cruz*, 894 F.2d 41, 44 (2d Cir. 1990) ("Each hearsay statement within multiple hearsay statements must have a hearsay exception in order to be admissible."); *Fla. Canal Indus., Inc. v. Rambo*, 537 F.2d 200, 201-03 (5th Cir. 1976) ("While the report was clearly made in the regular course of . . . business, it was offered to prove the truth of the matters asserted in a hearsay statement made . . . by a person not acting in the regular course of his business.").

Resolution of the conflict and review of the decision below is important in order to advance important policies and principles underlying the Federal Rules of Evidence. The intrinsic unreliability of "hearsay within hearsay" is recognized by cases addressing its exclusion on Rule 403

grounds.[2] For example, in *Boren v. Sable*, the Tenth Circuit held that:

> "with every increased level of hearsay there is a corresponding decrease in reliability. . . ."
>
> Certainly, the trial judge has discretion under Rule 403 to exclude a statement of multiple hearsay, even if each included portion meets the requirements of an exception, when he finds the statement so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion.

887 F.2d 1032, 1036 (10th Cir. 1989) (*quoting* Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 05[01] (1996)).

Applying these principles, the government's failure to afford Mr. Reeder the opportunity to cross-examine Messrs. Kreick, Hamilton and Hill rendered those reports inadmissible on hearsay grounds, and they should have been excluded. As *Vigneau* notes, "despite its language, the business records exception does not embrace statements contained within a business record that were made by one who is *not* a part of the business if the embraced statements are offered for their truth." 187 F.3d at 75. The rationale for the business records exception, that regularity of procedure, coupled with business incentives to keep accurate records, provide reasonable assurance that the record is trustworthy, does not extend to information provided by a stranger to the business. *See id.* The decision below represents a departure

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[2] *See Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 620 (4th Cir. 1991) (even where certain statements may have satisfied Rule 805, they were "confusing" and "could have resulted in untoward prejudice" and thus excludable under Rule 403).

from this established policy.

The Ninth Circuit's decision, in affirming the admission of these documents, does not merely misapply the hearsay rules to the facts. To the contrary, it assumes that once a document is authenticated as being part of a file that is a "business record," any further hearsay objection in connection with that document is precluded. Accordingly, the decision below is in conflict with *Patrick* and its progeny.

B. The Ninth Circuit Ignored That, Although Mr. Reeder Stipulated The Bank Files To Be Authentic Business Records, This Did Not Waive Objections To Third Party, Non-Bank Hearsay Statements Found Within Those Files

In affirming the judgment, the Ninth Circuit held that Mr. Reeder's "hearsay within hearsay" objection had been waived by reason of a stipulation confirming that the bank files in which the appraisals were contained were "business records" of the banks. (App. A at 2.) This conclusion, however, necessarily (and incorrectly) assumed that if a bank file is a "business record," then any third-party hearsay embedded within that file is automatically admissible. As noted, this is untenable under *Patrick*. Thus, if the First Circuit's rule in *Patrick* had been properly applied, the court below would have been required to hold that error was preserved[3] – and indeed that reversible error occurred.

Moreover, the mere fact that the bank files themselves were stipulated to be "authentic" business records is inapposite.[4] The court below "confus[ed] authenticity with

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[3] Indeed, during trial, defense counsel specifically complained that the appraisers were not available for cross-examination, thus preserving a hearsay objection.

[4] Furthermore, in its brief to the Ninth Circuit, the government, in *(cont'd)*

trustworthiness, neither of which is a substitute for the other. The stipulation of the parties that a letter is what it purports to be, i.e., is authentic, in no way guarantees the trustworthiness of statements made in such a letter." *Goldsmith v. Comm'r*, 86 T.C. 1134, 1140 (1986).

In light of the conflict between the Ninth Circuit's position and that of the First Circuit, a writ of certiorari is warranted.

II. The Decision To Admit Lay Opinion Testimony On Property Value Conflicts With Decisions Of The Fifth Circuit And Numerous Lower Courts, Holding That Such Testimony May Only Be Granted By A Competent Real Property Valuation Expert

A. The Decision Below Creates A Split With The Fifth Circuit And Undermines The Policies And Protections Of The Federal Rules Of Evidence.

It is a cornerstone principle of Rule 701 that lay opinion is no substitute for expert testimony on matters requiring technical expertise. *See United States v. Glenn*, 312 F.3d 58, 66 (2d Cir. 2002). As courts have found, the valuation of real estate is a well-recognized area of technical expertise. *See United States v. 60.14 Acres of Land*, 362 F.2d 660, 668 (3d Cir. 1966) ("[T]he essential elements of the real estate expert's competency include his knowledge of the property and of the real estate market in which it is situated, *as well as* his evaluating skill and experience as an appraiser.") (emphasis added); *Cuyahoga Metro. Hous. Auth. v. United*

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support of its argument that Mr. Reeder had waived his right to object to the foreclosure appraisals, misleadingly cited a second, more detailed stipulation. The government failed to disclose that none of the subject foreclosure appraisals comes within this second stipulation.

States, 60 Fed. Cl. 481, 483 (2004) ("Indeed, it is well-accepted that the selection of comparable properties requires knowledge of the critical characteristics of a given set of properties and how those characteristics are viewed in a given market, and that evidence on such matters ordinarily is produced through *one shown to have the skills of an appraiser*.") (emphasis added).

In recognition of these principles, the Fifth Circuit, in *Hidden Oaks Ltd. v. City of Austin*, upheld a trial court's refusal to allow a lay witness' opinion on the market value of real property, even though the witness regularly bought and sold property in the nearby area for his employer. 138 F.3d 1036, 1050 (5th Cir. 1998). The trial court, consistently sustaining the City's objections, had ruled that the witness was "unqualified to testify as an expert in appraising property." *Id.* In affirming on appeal, the Fifth Circuit noted that the witness "was not a licensed appraiser[,] . . . had no formal schooling in the methods of appraisal[,] and was unable to respond fully to . . . questions regarding standard appraisal theory." *Id.*

Similarly, in *Cuyahoga Metropolitan Housing Authority*, the federal Court of Claims held that an opinion on the market value of real property "*can only be offered through a qualified expert under Rule 702.*" 60 Fed. Cl. at 484 (emphasis added). In that case, the government sought to introduce valuation testimony from its lay witness, who was the local director of a federal housing agency (HUD). *See id.* at 481-82. In ruling the testimony (which was based on "comparable properties" in the nearby area) inadmissible, the court cited the requirement of the Federal Rules of Evidence that a lay witness cannot opine for the court and jury on matters of "scientific, technical, or other specialized knowledge within the scope of Rule 702." *Id.* at 481-83 (citing Fed. R. Evid. 701). The court explained that, as the Advisory Committee to the Federal Rules of Evidence has noted, "the purpose of this component of Rule 701 is to

eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *Id.* at 483 (internal quotations omitted). Accordingly, "the selection of properties comparable to those at issue, as well as the various calculations made . . . with respect to those properties . . . requires mastery of a specialized field." *Id.*[5]

The Ninth Circuit's holding that Ms. Rasmussen, a mere real estate agent with no formal training in appraisal principles, was capable of providing the jury with valuation testimony, raises a conflict with the above-cited precedent.

Although defense counsel explicitly objected to the lack of "foundation" for Ms. Rasmussen's valuation testimony, the Ninth Circuit still applied a "plain-error" standard of review on the Rasmussen testimony. (App. A at 2.) In doing

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[5] In *Hebbler v. Turner*, the court was squarely faced with the issue of whether a mere real estate agent/broker may provide valuation testimony. Civ. Act. No. 03-0388, 2004 U.S. Dist. LEXIS 3258, at *2 (E.D. La. Mar. 1, 2004). Although the witness was an experienced real estate agent (over ten years) and had much familiarity with the surrounding area, the court held that she was *not* competent to provide an opinion on the estimated value of the property in question. *Id.* at *11. *See also United States v. Yeich*, 74 F.R.D. 561, 562 (E.D. Pa. 1977) (finding that the defendant was not qualified and therefore not competent to provide valuation testimony). The court noted that not only was the witness not a licensed appraiser, but "she *ha[d] not demonstrated any adherence to standard principles of appraisal*." *Hebbler*, 2004 U.S. Dist. LEXIS 3258, at *7 (emphasis added). The issue has also arisen in the federal bankruptcy courts. In *Donoway v. Tucker*, the court held that "[r]eal estate brokers and agents without specialized training in real estate appraising are not qualified to testify as to their opinions regarding fair market value [of real property]." 139 B.R. 156, 158 (Bankr. D. Md. 1992). As is frequently the case in federal bankruptcy proceedings, the relevant issue in *Donoway* was the determination of the value of debtor's real property. *See id.* The court held that "only the testimony of a qualified expert, such as an experienced appraiser, would be admissible on the issue." *Id.*

so, the Ninth Circuit necessarily (but incorrectly) assumed that the absence of a "foundation[al]" basis for giving an opinion on real property value was an improper objection – an assumption which is contradicted by *Hidden Oaks* and its progeny. Thus, were the Fifth Circuit's rule properly applied, the objection would have been sufficient (and indeed should have been sustained).

In any event, as the Sixth Circuit has held, an objection to lay opinion testimony need only incorporate the analysis of Rule 701,[6] *See United States v. Sheffey*, 57 F.3d 1419, 1424-25 (6th Cir. 1995).[7] As courts have explained, the admissibility of lay (or expert) opinion testimony incorporates a core "foundational" requirement. For example, in *United States v. Rea*, 958 F.2d 1206, 1215-17 (2d Cir. 1992), the Second Circuit explained that a proper

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[6] Other Circuits have applied a similar analysis to objections that incorporate other Federal Rules of Evidence. *See United States v. Whitaker*, 127 F.3d 595, 601 (7th Cir. 1997) ("Counsel's questions about the accuracy of the retrieval of the records were sufficient to preserve his objection as to authenticity."); *Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150, 154 (1st Cir. 1992) (rejecting the argument that 404(b) objection was not preserved for review "because Bonilla did not mouth the words of Rule 404(b)"; instead, his 403 objection was sufficient to preserve the 404(b) issue because "Rules 403 and 404(b) go hand in glove").

[7] In *Sheffey*, the prosecution asked several eyewitnesses to an auto accident for their opinion on whether the defendant had driven "recklessly, in extreme disregard of human life." 57 F.3d at 1422. Defendant's counsel objected on the grounds that "[t]hat's the question for the jury." *Id.* On appeal, the Sixth Circuit held that the defendant's "ultimate-issue" objection sufficiently preserved for review the issue of whether the eyewitnesses' testimony constituted improper lay opinion under Rule 701. *Id.* at 1424-25 (citing *Torres v. County of Oakland*, 758 F.2d 147, 149 & n.1 (6th Cir. 1985) (holding that an objection to opinion testimony was properly preserved for appeal where the ground of the objection was clear from the context)).

"*foundation*" must be laid for lay opinion testimony to be admissible. The court explained that, in laying such a foundation, among the foremost factors in determining the testimony's admissibility are the witness' "background and experience." *Id.* "When a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701." *Id.* at 1216. Therefore, Mr. Reeder's "foundation" objection "clearly incorporates the analysis of Rule 701," *Sheffey*, 57 F.3d at 1425, and was sufficient.

B. Decisions Among The Lower Federal Courts Bespeak Confusion, Making The Issue Ripe For Resolution By This Court

As a result of this ruling, the Ninth Circuit now stands alone among Circuit courts, plus joins a handful of lower federal courts, in allowing a mere real estate agent/broker, without any formal appraisal training, to provide valuation testimony on what may be (as Mr. Reeder's case illustrates) the decisive issue of the case.

For example, in *United States ex rel. Goodstein v. McLaren Regional Medical Center*, the district court rejected the government's objections to valuation testimony provided by three real estate brokers. 202 F. Supp. 2d 671, 679 (E.D. Mich. 2002). The government argued that such opinion testimony "does not satisfy the reliability and relevancy considerations of Fed. R. Evid. 702" because real estate agents/brokers do not "demonstrate sufficient training or experience in a recognized methodology." *Id.* at 678-79. However, the court, in direct contravention of the Fifth Circuit's statement in *Hidden Oaks* that personal experience is no substitute for formal appraisal principles, held that real estate agents/brokers "are qualified as experts by their personal knowledge and experience with commercial leasing, and by their training and education in real estate." *Id.* at 679.

Similarly, the bankruptcy court in *In re Smith*, apparently

acknowledging the confusion among the lower federal courts on this issue, decided that it would "follow[] those decisions holding that an experienced real estate broker may qualify as an expert for the purposes of providing valuation testimony notwithstanding a lack of formal appraisal training." 267 B.R. 568, 574 (Bankr. S.D. Ohio 2001) (noting, however, that the decision was "a close call"). *See also In re Robertson*, 135 B.R. 350, 353 (Bankr. E.D. Ark. 1992) (holding that a real estate broker of 21 years, despite his "lack of training and other qualifications in this area," was qualified to provide a valuation opinion at trial).

Given the confused state of the law on this issue, along with the threat to the policies and protections of the Federal Rules of Evidence that is posed by this opposing line of precedent, a writ of certiorari for this Court's review and clarification is warranted.

III. A Grant Of Certiorari Would Further Congress's Important Policy Goals By Ensuring That The Rules Governing Property Valuation Evidence Demand The Appropriate Guarantees Of Reliability And Trustworthiness

In adopting the Federal Rules of Evidence, Congress intended for the uniform application of the business records exception to the hearsay rule, which was carefully crafted under a compromise guaranteeing the "trustworthiness" and "reliability" of evidence falling within this exception. S. Rep. No. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7063-64 ("The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception.").[8] The report of the

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[8] *See also* 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5006 (2d ed. 2005) (noting the significant amount of testimony to the House Judiciary Committee dealing with the "unhapp[iness] with the way the Rules dealt with *(cont'd)*

Senate Committee on the Judiciary, commenting specifically on the business records exception, states:

> A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from *a person with knowledge.*

Id. (emphasis added). The Committee went on to define the term "'person with knowledge' . . . to be coterminous with the custodian of the evidence or other qualified witness." *Id.* Accordingly, courts have developed a strong policy against admitting third-party statements of which the corporate custodian has no knowledge (such as the First Circuit in *Patrick* and *Vigneau*) – a policy which is subverted by the decision below. A grant of certiorari would ensure the adoption of consistent evidentiary standards on property valuation that will give litigants assurance that such evidence is both trustworthy and reliable.

More broadly, the decision of the court below, by breaking with other Circuits' established precedent on the issues of hearsay within hearsay and lay opinion testimony, frustrates "the strong policy of uniformity, evidenced by Congress in sanctioning the enactment of . . . the Federal Rules of Evidence."[9] *Boggs v. Blue Diamond Coal Co.*, 497

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hearsay").

[9] In adopting the Rules in the mid 1970s, one member of the Senate Committee for the Judiciary observed that the Rules were adopted as a "*comprehensive* code of evidence" meant to bring "*uniformity and clarity* in the present law of evidence on the Federal level." S. Rep. No. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7055 (Sen. Hruska). (emphasis added).

> On the issue of unreliable opinion testimony, uniformity in

(cont'd)

F. Supp. 1105, 1119 (E.D. Ky. 1980). As federal courts have observed, "uniformity [of federal evidentiary rules] among the circuits fosters predictability . . . and suppresses forum shopping." *In re Grand Jury Investigation*, 399 F.3d 527, 536 n.4 (2d Cir. 2005). It also serves federal trial attorneys. *See Boggs*, 497 F. Supp. at 1119-20. *See also* Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumblings in the Future of Proof*, 3 Ohio St. J. Crim. L. 523, 526, 531 (2006). Finally, as a matter of fairness to criminal defendants, the uniformity of federal evidentiary rules "promotes the uniform disposition of criminal matters in the federal system." *United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988).[10] A grant of certiorari would therefore promote the uniform application of federal evidentiary rules as Congress intended.

CONCLUSION

The petition for certiorari should be granted.

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excluding such evidence has the added desirability that "it will (1) enhance the truth-seeking purpose of federal evidence law, and (2) free the trial judge to focus his efforts on difficult questions of reliability, rather than on evidence that is manifestly unreliable." Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What's Wrong with Daubert and How to Make It Right*, 2007 Utah L. Rev. 131, 159 (2007). While this commentator was discussing expert testimony that has been proffered as such, these justifications apply equally, if not more so, to expert testimony disguised as lay opinion testimony.

[10] *See also* Fed. R. Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

Respectfully submitted,

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August 15, 2007

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED MAY 17, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-50866

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN REEDER,

Defendant-Appellant.

MEMORANDUM*

Submitted April 10, 2007**
Pasadena, California.

May 17, 2007

Before: PREGERSON, FERNANDEZ and SILER,*** *Circuit Judges*.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a)(2).

*** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix A

Stephen Reeder appeals his conviction and sentence for bank fraud. *See* 18 U.S.C. § 1344. We affirm.

(1) Reeder asserts that the district court plainly erred when it allowed appraisals obtained by the defrauded banks to be admitted in evidence. We disagree. Reeder waived his business record foundation claims when he expressly and voluntarily stipulated to the records' foundation. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); *United States v. Ferreira-Alameda*, 804 F.2d 543, 545 (9th Cir. 1986); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976) (per curiam). The evidence was more probative than unfairly prejudicial. *See* Fed.R.Evid. 403. Moreover, Reeder's rights under the Confrontation Clause of the Sixth Amendment were not violated. *See Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 1367, 158 L. Ed. 2d 177 (2004); *United States v. Cervantes-Flores*, 421 F.3d 825, 833-34 (9th Cir. 2005) (per curiam), *cert. denied*, __ U.S. __, 126 S. Ct. 1911, 164 L. Ed. 2d 668 (2006).

(2) The district court did not plainly err when it allowed a real estate broker to explain why she had advised her seller client about the sale price. *See* Fed.R.Evid. 701; *United States v. Simas*, 937 F.2d 459, 464-65 (9th Cir. 1991).

(3) Nor did the district court err when it permitted the government to cross-examine appraiser Stephen Barr about investigations into his prior appraisal activity; the government had information to justify that questioning. *See United States v. Gay*, 967 F.2d 322, 328 (9th Cir. 1992); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981); *Zaragoza-Almeida v. United States*, 427 F.2d 1148, 1149-50 (9th Cir. 1970).

(4) Even if some of the evidence about appraiser Charles Vilotti was inadmissible hearsay, it was not objected to and its admission did not affect Reeder's substantial rights. Moreover, no plain error reversal is required by the fact that the government asked Barr twice if he knew that Vilotti had been disciplined. An objection was sustained both times, the district court was not required to grant a mistrial,[1] and there was no request for one.[2]

(5) The cross-examination of Reeder's witnesses, Murray Mead and Betty Curl, was reasonably related to topics that they had testified to on direct examination. *See United States v. Vasquez*, 858 F.2d 1387, 1392 (9th Cir. 1988). Moreover, it was otherwise properly admitted. *See* Fed.R.Evid. 403, 404(a); *United States v. Jenkins*, 785 F.2d 1387, 1395-96 (9th Cir. 1986). There was no error.

(6) The district court did not err when it permitted the government to impeach Curl with her prior statement, which both cast doubt upon her truthfulness and exposed her bias. *See United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002); *United States v. Scott*, 74 F.3d 175, 177 (9th Cir. 1996); *United States v. Higa*, 55 F.3d 448, 451-52 (9th Cir. 1995). Nor was Curl's testimony unduly prejudicial. *See* Fed.R.Evid. 403.

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1. *See United States v. Steele*, 298 F.3d 906, 912 (9th Cir. 2002).

2. *See United States v. Maciel-Vasquez*, 458 F.3d 994, 996 n. 3 (9th Cir. 2006); *Simas*, 937 F.2d at 464; *United States v. Henderson*, 404 F.2d 832, 834 (9th Cir. 1968).

(7) The district court did not abuse its discretion when it allowed the admission of financial statements used by Reeder's co-conspirators in obtaining fraudulent loans. The notion that the admission of those statements was too confusing is simply otiose.

(8) Moreover, evidence of Reeder's use of a false name when dealing with a lender was proper to help cast light upon Reeder's intent, plans and knowledge. *See* Fed.R.Evid. 404(b); *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981) (per curiam); *United States v. Pitman*, 475 F.2d 1335, 1338 (9th Cir. 1973); *see also United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13 (9th Cir. 1995). Also, the evidence was not unduly prejudicial. *See United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir. 1984) (per curiam).

(9) The district court did not err when it permitted attorney Gregory Grantham to testify despite Reeder's assertion of the attorney-client privilege. The district court properly determined that the privilege was not available because Grantham was not acting as Reeder's attorney in the transactions testified to,[3] and if he had been acting as Reeder's attorney, the crime-fraud exception applied.[4]

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3. *See United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000); *see also Ralls v. United States*, 52 F.3d 223, 226 (9th Cir. 1995).

4. *See UMG Recording, Inc. v. Bertelsmann AG (In re Napster Inc. Copyright Litig.)*, No. 06-15886, slip op. 3065, 3091-92 (9th Cir. Mar. 14, 2007); *United States v. Chen*, 99 F.3d 1495, 1503-04 (9th Cir. 1996); *In re Grand Jury Proceedings*, 87 F.3d 377, 381-82 (9th Cir. 1996).

(10) No plain error resulted from the government's closing argument, which, at the very least, drew fair inferences from the evidence. *See United States v. Rude*, 88 F.3d 1538, 1548-49 (9th Cir. 1996).

(11) In the context of this case, the instructions actually given were sufficient. *See United States v. Frega*, 179 F.3d 793, 806 n. 16 (9th Cir. 1999); *United States v. Dees*, 34 F.3d 838, 842-43 (9th Cir. 1994); *United States v. Heck*, 499 F.2d 778, 790 (9th Cir. 1974); *cf. United States v. Chambers*, 918 F.2d 1455, 1460 (9th Cir. 1990) (holding that in context it was not necessary to define "knowingly").

(12) Despite Reeder's claims to the contrary, it is apparent from the record that the district court properly considered the sentencing factors, including the Sentencing Guidelines. *See* 18 U.S.C. § 3553; *United States v. Mohamed*, 459 F.3d 979, 985 (9th Cir. 2006); *United States v. Ellsworth*, 456 F.3d 1146, 1153 n. 3 (9th Cir.), *cert. denied*, __ U.S. __, 127 S. Ct. 753, 166 L. Ed. 2d 583 (2006); *United States v. Mix*, 457 F.3d 906, 912 (9th Cir. 2006). Neither were its findings of fact clearly erroneous. *See United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005). Nor was Reeder's sentence unreasonable because it was different from those of his confederates. His situation — his conduct and history — were also different. *See United States v. Plouffe*, 445 F.3d 1126, 1131-32 (9th Cir.), *cert. denied*, __ U.S. __, 126 S. Ct. 2314, 164 L. Ed. 2d 832 (2006); *see also United States v. Marcial-Santiago*, 447 F.3d 715, 717 (9th Cir.), *cert. denied*, __ U.S. __ , 127 S. Ct. 309, 166 L. Ed. 2d 232 (2006). Because the Guideline range was only 10 months, the district court was not required by 18 U.S.C. § 3553(c)(1) to state

separate particular reasons for a sentence within that range.[5] Reeder's misguided claim to the contrary is frivolous.

AFFIRMED.

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5. In so stating, we assume, without deciding, that the 18 U.S.C. § 3553(c)(1) determination is still applicable after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

APPENDIX B — JUDGMENT AND PROBATION/ COMMITMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED NOVEMBER 14, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs.

Defendant STEPHEN REEDER
Steve Reeder; Steven Reeder;
akas: Mark Ellington Roser

Docket No. SA CR01-135-AHS

Social Security No. 8 9 1 3
(Last 4 digits)

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
NOV.	07	2005

WITH COUNSEL Lawrence R. Young, Rtnd.
(Name of Counsel)

* * *

Appendix B

FINDING

There being a finding/verdict of GUILTY, defendant has been convicted as charged of the offense(s) of:
Bank Fraud, Causing an Act to Be Done in violation of 18 USC §§ 1344, 2(b) as charged in Counts 1-3 of the 3-Count Indictment.

JUDGMENT AND PROB/COMM ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

Forty-six (46) months. This term consists of forty-six (46) months on each of Counts 1-3 to be served concurrently.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $150, which is due immediately.

IT IS FURTHER ORDERED that the defendant shall pay restitution in the total amount of $30,000, pursuant to 18 U.S.C. § 3663. The amount of restitution ordered shall be paid as follows:

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Victim	Amount
Washington Mutual Bank Att: Joyce Laca 400 East Main Street, Fourth Floor Stockton, California 95202	$ 7,600
First Horizon Home Loan Corporation Att: Dean McGee 4000 Horizon Way Irving, Texas 75063	$13,000
Guaranty Residential Lending Att: Caroline Jones P.O. Box 40 Austin, Texas 78767	$ 9,400

IT IS FURTHER ORDERED that if the defendant makes a partial payment, each payee shall receive approximately proportional payment.

IT IS FURTHER ORDERED that restitution shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program. If any amount of restitution remains unpaid after release from custody, monthly installments of at least $500 shall be made during the period of supervised release and shall begin 30 days after the commencement of supervision.

IT IS FURTHER ORDERED that as to this amount of restitution, the defendant shall be held jointly and severally

liable with codefendants Diane Caroline Fullerton and Raymond L. Hastey, Jr. for the amount of restitution ordered in this judgment.

IT IS FURTHER ORDERED that the defendant shall comply with General Order No. 01-05.

IT IS FURTHER ORDERED that all fines are waived as it is found that the defendant does not have the ability to pay a fine in addition to restitution.

IT IS FURTHER ORDERED that upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on each of Counts 1-3, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U. S. Probation Office and General Orders 318 and 01-05;

2. The defendant shall abstain from abusing alcohol during the period of supervision;

3. During the period of community supervision the defendant shall pay the special assessment and restitution in accordance with this judgment;

4. As directed by the Probation Officer, the defendant shall apply any monies received from income tax refunds, lottery winnings, inheritance, judgements, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation;

Appendix B

5. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport, or any other form of identification in any name, other than the defendant's true legal name, without the prior written approval of the Probation Officer; nor shall the defendant use, for any purpose or in any manner, any name other than his true legal name;

6. The defendant shall not engage, as whole or partial owner, employee, or otherwise, in any business involving real estate sales or mortgage loan programs without the express approval of the Probation Officer prior to engagement in such employment. Further, the defendant shall provide the Probation Officer with access to any and all business records, client lists, and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the Probation Officer; and

7. The defendant shall cooperate in the collection of a DNA sample from him pursuant to 42 U.S.C. § 14135a.

IT IS FURTHER ORDERED that the drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future illegal substance abuse.

IT IS FURTHER ORDERED that the defendant surrender himself to the institution designated by the Bureau of Prisons on or before 12 noon on January 16, 2006. In the

absence of such designation, the defendant shall report on or before the same date and time to the United States Marshal located at the United States Court House, 411 West Fourth Street, Santa Ana, California 92701-4516.

IT IS FURTHER ORDERED that the bond is exonerated upon surrender and not I-afore, with pretrial services conditions to remain in effect.

Defendant informed of right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

NOV 14 2005	s/ Alicemarie H. Stotler
Date	Chief U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

NOV 14 2005	By s/ [illegible]
Filed Date	Deputy Clerk

APPENDIX C — RELEVANT RULES OF EVIDENCE AND STATUTES

Fed. R. Evid. 403 provides:

> *Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

* * *

Fed. R. Evid. 701 provides:

> *If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are*
>
> *(a) rationally based on the perception of the witness,*
>
> *(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and*
>
> *(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

* * *

Appendix C

Fed. R. Evid. 702 provides:

> *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if*
>
> *(1) the testimony is based on sufficient facts or data,*
>
> *(2) the testimony is the product of reliable principles and methods, and*
>
> *(3) the witness has applied the principles and methods reliably to the facts of the case.*

* * *

Fed. R. Evid. 801 provides:

> The following definitions apply under this article:
>
> ***(a) Statement.*** *A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.*
>
> ***(b) Declarant.*** *A "declarant" is a person who makes a statement.*

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***(c) Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.*

***(d) Statements which are not hearsay**. A statement is not hearsay if –*

*(1) **Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or*

*(2) **Admission by party-opponent**. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B)*

Appendix C

a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

* * *

Appendix C

Fed. R. Evid. 803(6) provides:

> *A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.*

* * *

Fed. R. Evid. 805 provides:

> *Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.*

* * *

Appendix C

18 U.S.C. § 1344 provides:

> *Whoever knowingly executes, or attempts to execute, a scheme or artifice –*
>
> *(1) to defraud a financial institution; or*
>
> *(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;*
>
> *shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.*